IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

WRIT PETITION NO.1831 OF 2004

Prasad Manohar Pandave)
Adult, Indian Inhabitant,)
formerly residing at A-2, Jai)
Jyoti Co-op. Housing Society)
Ltd., Old Dombivali, Shastri)
Nagar, Dombivali (West))
Dist. Thane and presently)
residing at A-402, 4th Floor,)
Green Park Annexe Co-op.Hsg.)
Society Ltd., Sunil Nagar,)
D.N.C. Road, Dombivli (East))..PETITIONER

Versus

1. Union of India through the)
the Secretary, Ministry of)
Finance, Department of)
Revenue, Central Board of)
Direct Taxes, North Block,)
New Delhi-110 011)
2. Chief Commissioner of Income)
Tax, having his office at)
Ayakar Bhavan, Maharshi Karve)
Road, Mumbai-400 020.)..RESPONDENTS

Mr. N.K. Nesari with Mr. V.K. Damle, for the Petitioner

Mr.Suresh Kumar with Mr. D.A. Dubey, for the Respondents.

CORAM: F.I. REBELLO & S.P.KUKDAY, JJ.
DATE : 12th April,2005

ORAL JUDGMENT (PER F.I. REBELLO, J.)

. The petitioner was a counter-clerk working in the canteen in the Income-tax Department.The Ministry of Finance, Department of Revenue, Government of India, issued a Circular dated 11th January, 1993 making eligible canteen employees to appear in the Departmental Examination. The petitioner appeared for the examination in June, 1998. The petitioner passed the said examination. He, however, was not issued any order of appointment. Various representations were made from

time to time. Respondents by communication dated 24th July, 2000 withdrew the concession granted vide letter dated 11th January, 1993. As the petitioner was not issued the letter of appointment he filed Original Application before Central Administrative Tribunal which was numbered as O.A. No.805 of 2002. That came to be dismissed by order dated 10tbh February,, 2004 against which the present petition has been filed.

2. On behalf of the petitioner his learned Counsel submits that it was pursuant to relaxation of the Rules that the petitioner was allowed to appear for the examinations. He passed the examination before the communication dated 24th July, 2000 and in these circumstances he could not have been denied the right to be appointed to the post of L.D. Clerk in the Income Tax Department. Learned Counsel also draws our attention to the Recruitment Rules framed under Article 309 of the Constitution of India and more specifically Rule 8. It is submitted that by virtue of Rule 8 the Central Government is of the opinion that it is necessary or expedient so to do, it may, by order, for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons. In the instant case it is submitted that the communication of the year 1993 is in fact issued in exercise of the power conferred by Rule 8 and that being so the petitioner ought to have been issued letter of appointment to the post of L.D.C. The learned Tribunal in not considering that aspect has committed error of law which is apparent on the face of record and consequently the impugned order is liable to be set aside and the relief as prayed for be granted.

2. On the other hand on behalf of the respondents an affidavit has been filed by C.K.K. Nair, Assistant Commissioner of Income Tax Service Litigation. It is therein pointed out that the petitioner has prayed for reliefs which really are not available to him including counting of seniority when he was and still not in the employment of the Department.It is also set out that merely because the petitioner was selected does not confer a right upon him to be appointed. Appointment has to be in terms of the existing Rules. Apart from that, the concession of 11th January, 1993 was withdrawn by letter dated 24th July 2000. Under the Rules framed under Article 309 the post which the petitioner was holding was not a feeder post for promotion to the post of L.D.C. and in these circumstances the respondents could not have appointed the petitioner and consequently have not so appointed. The order of CAT, it is submitted, therefore, does not suffer from any error apparent on the face of the record and consequently is not liable to be quashed and set aside.

3. We have heard learned Counsel for the parties. Admittedly there are Rules framed under Article 309 of the Constitution of India. In so far as the post of L.D.C. is concerned, that is covered under Item 6 of the Rules. The recruitment is 90% by direct recruitment and 10% by promotion. In so far as promotion is concerned, the 10% vacancies have to be filed in from regular Group "C" i.e. Notice Server, Record Keeper and Staff Car Driver) and Group "D" employees subject to the further conditions namely that 5% quota reserved for those who qualify in the Departmental examination, 5% quota reserved for Senior Group "C" and Group "D" employees who are

matriculate. The petitioner seeks appointment against this 10% quota for promotees.

4. There is no dispute that by virtue of Circular dated 11th January, 1993 persons like the petitioner who were not employees in the Department were eligible to appear for the Departmental examination. The said communication sets out various categories of canteen employees who will be eligible to appear in the Departmental examination in the Income tax Department. In so far as L.D.C. is concerned, the categories included are Sweeper, washboy, coffee, Tea maker, Assistant Halwai Cook, Clerk and Salesman. The Circular further provided that the services of the employees with effect from 1st October, 1991 are to be taken into account for the purpose of determining the eligibility for appearing in the Departmental examination. The issue is whether this Circular dated 11th January, 1993 can be said to be issued pursuant to the power conferred under Rule 8 of the Recruitment Rules made under Article 309 of the Constitution of India. Rule 8 as we have noted earlier is the power to relax. In other words for the purpose of promotion it is open to the Central Government to make relaxation of age, education, qualification, experience and the like. The question is whether the posts which were not included in the feeder post can be included by exercising the power under Rule 8. Once the Rules are made under Article 309 of the Constitution of India the Rules can be amended only under Article 309 or by legislation by a Competent Legislature. The power under Rule 8 is the power of relaxation. Under the power to relax it is impermissible for the Government to add categories which were not included in the Rules. Such an exercise would not be an exercise in

relaxation. Once it be so understood the communication of 1993 cannot be referable to Rule 8.

5. The next question is whether because the petitioner pursuant to the Circular which was in force and who appeared for the examination and who passed the examination has a right to be appointed. Selection merely confers a right on the selected candidates to be considered for appointment. It is open to the appointing authority based on the selection either to appoint or not to appoint. If the Appointing Authority decided not to appoint it must satisfy the Court that the action is not arbitrary, but based on cogent reasons. In the instant case the petitioner himself approached the Tribunal in the year 2002. The circular as noted earlier was withdrawn on 24th July, 2000. Even assuming that the petitioner considering that he had passed the examination before the circular was withdrawn had a right to be considered whether the reasons given by the appointing Authority in not appointing the petitioner can be said to be arbitrary. As noted earlier the appointing authority has to appoint in terms of the recruitment rules in force. It is permissible if there be vacancies in posts to so fill them without violating the mandate of Recruitment Rules made under Article 309 of the Constitution. It is not, however, permissible to add to the Rules without they being amended under Article 309. IN the instant case admittedly the petitioner was not belonging to any of the feeder categories. Once that be the case, it cannot be said that the action of the respondent in not appointing the petitioner is arbitrary.

6. For the aforesaid reasons we find no reason to

interfere with the order of CAT. Writ Petition accordingly dismissed. No order as to costs.

(F.I. REBELLO, J.)

(S.P. KUKDAY, J.)